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No. 91-2060

In The

Supreme Court of the United States

October Term, 1992

JOSEPH TESTA and ANTHONY SENTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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10

TABLE OF CONTENTS

Page

Argument 1

Conclusion 8

TABLE OF AUTHORITIES

CASES

Burks v. United States, 437 U.S. 1 (1978) 6

In Re Quarles, 158 U.S. 532 (1895) 4

Motes v. United States, 178 U.S. 45 (1900) 4

Richardson v. United States, 468 U.S. 317 (1984) 6

United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976) 2

United States v. Feola, 420 U.S. 671 (1975) 3

United States v. Guest, 383 U.S. 745 (1966) 2

United States v. Guillette, 547 F.2d 743 (2d Cir. 1976) 2

United States v. Guzzino, 810 F.2d 687 (7th Cir. 1987) 2

United States v. Harvey, 526 F.2d 529 (2d Cir. 1975) 2

United States v. Kozminski, 487 U.S. 931 (1988) 2

United States v. O'Dell, 462 F.2d 224 (6th Cir. 1972) ...3, 5

United States v. Yermian, 468 U.S. 63 (1984) 3

STATUTES

18 U.S.C. § 111 3

18 U.S.C. § 241 ..... *passim*

18 U.S.C. § 1001 3

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1. In contending that 18 U.S.C. § 241 was properly extended to the conduct of Petitioners Testa and Senter in this case, the Government merely echoes the unprecedented holding of the court of appeals, conclusorily setting it forth as established law, but provides no basis in legislative history or case law for such an expansive holding nor any reason why this Court should not review it. (U.S. Brf. at 19-21)

Petitioners asserted in their petition that since the enactment of § 241 in 1870 this is the first case to hold that the mere theoretical possibility that an act could be prosecuted as a federal crime, without more, is sufficient

to invoke federal jurisdiction over interference with the rights of a witness to that act. The Government has not cited a single case contradicting this statement. None of the cases the Government does cite extended 241 to circumstances like those here, where there was neither a federal proceeding pending or prospective nor evidence that the conspirators believed the victim could be a witness in a federal proceeding. In each "witness" case cited by the Government there was one or the other. *See United States v. Harvey*, 526 F.2d 529, 533 (2d Cir. 1975) (conspirators, already arrested on state burglary charges, plotted against witness for express reason that they "might be facing federal charges" if Government learned from witness that they had transported dynamite across state lines for use in burglary); *United States v. Guzzino*, 810 F.2d 687, 692-95 (7th Cir. 1987) (witness shot two days before defendant's federal trial); *United States v. Guillette*, 547 F.2d 743, 746 (2d Cir. 1976) (victim "was scheduled to be a key prosecution witness in a federal firearms case").

In the other § 241 cases cited by the Government, not involving witnesses or informers, the basis for federal jurisdiction under § 241 was plain because in each case there was "intentional interference with rights made specific by either the express terms of the Federal Constitution or laws or by decisions interpreting them." *United States v. Kozminski*, 487 U.S. 931, 941 (1988). *See United States v. Guest*, 383 U.S. 745, 757 (1966) (conspiracy to cause false arrest of Negroes in Georgia violated § 241 because right to travel from one state to another "occupies a position fundamental to our Federal Union" and "has been firmly established and repeatedly recognized"); *United States v. Barker*, 546 F.2d 940 (D.C. Cir.

1976) (government agents conspired to search office without warrant); *United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972) (state law enforcement officers conspired to arrest drivers and extort money from them under threat of continued jailing without due process).

The cases cited by the Government *not* involving § 241 are not at all apposite since the basis for federal jurisdiction is readily apparent in each. *See United States v. Yermian*, 468 U.S. 63 (1984) (prosecution under 18 U.S.C. § 1001 for making false statement in matter "within the jurisdiction of any department or agency of the United States"); *United States v. Feola*, 420 U.S. 671 (1975) (prosecution under 18 U.S.C. § 111 for assaulting federal agent). *Feola*, it is well worth observing, would be analogous to this case if it held that a person could be prosecuted under § 111 for assaulting someone who had the *qualifications* to be a federal officer and thus someday *could* become one.

The Government is flatly wrong in arguing that federal jurisdiction under § 241 is implicated at the moment a person comes into possession of information relating to a federal crime, thereby becoming a potential federal witness, because, "[u]nder a contrary rule, a defendant could avoid liability under Section 241 merely by arranging to murder the witness before the witness reports the crime to federal authorities." (U.S. Brf. at 19-20) Petitioners do not and have not advanced any such rule. Quite the contrary. Petitioners maintain that jurisdiction under § 241 is properly invoked if *either* a federal proceeding is actually pending or prospective *or* the conspirators acted in the belief that such a federal proceeding might be pending or prospective. Thus, "arranging to

murder the witness before the witness reports the crime to federal authorities" would not escape liability under § 241 if the witness was in fact going to report the crime to federal authorities *or* if the conspirators feared he would. But there has to be some concrete federal connection.

Contrary to the Government's representation of Petitioners' claim, Petitioners do not maintain that here "the evidence failed to show either that a federal proceeding at which Falcaro might *testify* was *actually pending*, or that they believed that such a proceeding might be initiated." (U.S. Brf. at 19; emphasis added.) That a proceeding was not actually pending, but prospective, would suffice. Thus, for example, Petitioners concede that § 241 is violated when a federal *informer* is murdered, even though no proceeding is pending and even though the informer may never actually give *testimony*. *See Motes v. United States*, 178 U.S. 458 (1900); *In re Quarles*, 158 U.S. 532 (1895). But the victim must inform, or be about to inform, *federal* authorities – or the conspirators must fear he will – to implicate § 241. Here, the only evidence was that the victim was going to inform *state* authorities.

As the foregoing makes clear, the Government is similarly incorrect – and its discussion of specific intent is therefore beside the point – in stating that Petitioners argue "that the government was required to prove that they at least feared that a federal prosecution would be brought against them." (U.S. Brf. at 20) To the contrary, Petitioners *concede* that the Government need not prove under § 241 that conspirators feared that the prospective proceeding would be a specifically federal one, so long as it would *in fact* be a specifically federal proceeding. But

there must be one or the other to invoke federal jurisdiction.

Finally, the Government's argument that there was, in any event, evidence that Petitioners "knew Falcaro to be a *potential* federal witness" is of no help to the analysis. (U.S. Brf. at 21; emphasis added.) Even if there were such evidence – and the Government cites none whatsoever, but merely draws an inference from the nature of the crimes – knowing someone to be a "potential" federal witness simply begs the question: is someone with knowledge of acts only theoretically prosecutable as federal crimes a "potential" federal witness so that injuring him violates § 241?

Moreover, regardless of whether one could properly infer solely from the nature of the crimes themselves that Petitioners knew the crimes were subject to federal as well as state prosecution, the sufficiency of such evidence would be beside the point, because the district court instructed the jury that it was necessary to find only that "it was *possible* or foreseeable that the [victim] could have become a federal witness if a trial or proceeding was eventually to take place" and that "the defendants were afraid that the information which the alleged subject of the conspiracy had would be revealed to *the authorities*." (Trial tr. at 31119-20; emphasis added.) No distinction was drawn between federal and state "authorities," and the evidence referred only to state authorities. Where a jury is instructed that it can find a defendant guilty on grounds broader than prescribed by statute, a conviction cannot stand. Thus, in *United States v. O'Dell*, 462 F.2d 224, a case cited by the Government itself, a conviction under § 241 was reversed because, although the conduct

proven at trial did constitute a violation of the victims' federal due process rights, the instructions to the jury defined the right of due process in terms of broader state rules. *Id.* at 230-31.

2. With respect to Petitioners Testa and Senter's claim that they should not have been retried on the § 241 charge because the court of appeals had held that the proof at their first trial was legally insufficient, the Government denies the distinction between this case and *Richardson v. United States*, 468 U.S. 317 (1984). (U.S. Brf. at 9-10) The Government can do so, however, only by driving a technical but unrealistic wedge into this case, splitting it into Petitioners' "prosecution" and codefendant Ronald Ustica's "prosecution," and asserting that the court of appeals' holding of insufficient evidence "was an event in Ustica's prosecution, not in petitioners'." (U.S. Brf. at 10) Similarly, the Government differentiates between "*their* hung jury" and the jury that convicted Ustica. (U.S. Brf. at 10; emphasis the Government's.)

The fact of the matter is that Petitioners and Ustica were tried before the same jury and that the failure of proof with respect to the American citizenship of the victims was one and the same as to Petitioners and Ustica. To contend as the Government does that the prosecutions of Petitioners and Ustica were separate because only Ustica was entitled to appeal to the court of appeals for review of the evidence is to draw an artificial distinction and exalt form over substance. Consonant with *Richardson* and *Burks v. United States*, 437 U.S. 1 (1978), and

with common sense, the court of appeals' judgment holding that the evidence was insufficient should be considered an acquittal-like "event" barring retrial of Petitioners.

3. The Government, noting that no conviction has ever been reversed because of the length and complexity of the trial (U.S. Brf. at 19 n. 10), appears to take the position (U.S. Brf. at 17-19) that no conviction ever should be, at least in the absence of the showing required by the court of appeals: "a showing that the issues were *actually* beyond the jury's competence" (Pet. App. 5; emphasis added).

In their petition, Petitioners Testa and Senter pointed out that such a showing of actual jury incomprehension is a virtual impossibility and that consequently the standard applied by the court of appeals precludes relief in *any* mega-trial, regardless of its length, size and complexity, because the most that defendants will ever be able to show is circumstantial evidence that the case was beyond the jury's ability to absorb and to assess intelligently. Here, the circumstantial evidence was compelling. Although the Government cleverly telescopes the actual 17-month trial into seven theoretical months (U.S. Brf. at 18), the indisputable fact that the trial transcript was 32,000 pages long belies the Government's assertion that Petitioners "vastly overstate" the length and complexity of the trial (U.S. Brf. at 18). The Government likewise ignores the fact that the jury charge occupied three days and that the jury remarkably delivered across-the-board guilty verdicts in 191 of 191 instances.

Equally distressing is the Government's argument that the mega-trial was "especially appropriate, since virtually all of the prosecution's evidence admitted at the joint trial would have been admissible at separate trial to

prove the existence and nature of the RICO enterprise." (U.S. Brf. at 17) Since mega-trials commonly include RICO charges, the Government's argument has no limiting principle and would permit boundless trials in every such case, regardless of length, size or complexity. Certiorari should be granted to establish that such trials do have bounds and to set reasonable standards by which to determine when those bounds have been exceeded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 31, 1992

Respectfully submitted,

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